Filed 3/18/19 P. v. Martinez CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

EFREN GONZALEZ MARTINEZ,

Defendant and Appellant.

F074817

(Super. Ct. Nos. PCF322196 & VCF282735)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Gary M. Johnson, Judge.

Jeffrey J. Gale, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lewis A. Martinez and Jennifer Oleksa, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Appellant Efren Gonzalez Martinez was convicted following a jury trial of cultivating marijuana (Health & Saf. Code, § 11358;[1] count 1) and possession of marijuana for sale (§ 11359; count 2). On appeal, he argues the court erred by denying his motion to quash the search warrant and suppress evidence and the court misinstructed the jury in regard to the Compassionate Use Act of 1996 (CUA) (§ 11362.5) defense. Upon review, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On July 29, 2015, a detective conducted an overflight operation and observed marijuana growing behind a residence later determined to be appellant's residence. Another detective conducted a ground level investigation and confirmed that he smelled fresh marijuana outside appellant's residence consistent with the other detective's overflight observations, and a search warrant was obtained. On August 6, 2015, Detective Demecio Holguin with the Tulare County Sheriff's Department executed the search warrant at appellant's residence. At trial, Holguin was qualified as an expert in the sales and cultivation of marijuana and the differentiation of medical and recreational marijuana. During his search, he did not observe a physician's recommendation for marijuana outside the residence but found one inside for 90 plants. He observed a marijuana grow site in the backyard with 98 live, viable plants and a "sophisticated watering system." He opined the plants were about one and a half months old and still in their vegetative state, not flowering. He testified they were obviously clones and that people generally plant clones because clones are females that will produce a known yield. Holguin did not locate any rolling papers, smoking pipes, or other paraphernalia used to ingest marijuana, or log books keeping track of appellant's use. He did not observe a scale, packaging, pay-owe sheets, or shipping materials. Holguin opined these materials were not present because the marijuana could have been intended to be transported

[1] All further statutory references are to the Health and Safety Code unless otherwise noted.

somewhere else for processing or the marijuana was not yet ready to be harvested or packaged.

Holguin testified he determines how much marijuana a person personally uses by asking them how and how much per day they use and multiplying that amount by 365. To determine whether the marijuana is used for sales or personal use, he looks for indicia of sales, like packaging, but primarily relies on the person's statement. Holguin stated that most medical marijuana patients use four or five up to 10 plants for the year and rarely reach a physician's 90- or 99-plant recommendation. People growing for sales normally go up to or past the limits stated on the physician's recommendations.

Holguin interviewed appellant when he executed the search warrant. Appellant told Holguin he smoked about eight to 11 cigarettes per day. Appellant opined each cigarette used about a half of a gram of marijuana. Holguin testified that at appellant's high estimate of 11 half-gram cigarettes, appellant used five and a half grams per day, which calculates to 2,000 grams, or approximately four and a half pounds, per year. Even if the cigarettes used one gram of marijuana, appellant's use would be eight to nine pounds per year.

Appellant told Holguin he estimated the 98 plants would yield approximately two to three pounds of processed marijuana total. Later he changed his statement and estimated the plants would yield eight pounds total. Holguin estimated *each plant* would yield about half a pound to one pound.

Holguin opined appellant possessed the marijuana for sale based on the totality of the circumstances. His conclusion was based on the following facts: (1) appellant was unemployed, had no income, and saved up money to buy the plants; (2) appellant had implemented a self-watering system and had sought assistance from someone to teach him how to grow; (3) appellant planted clones; (4) each plant would yield approximately half a pound to one pound at $500-$1,000 market price; (5) Holguin believed the amount of plants appellant was growing was not consistent with appellant's current medical

needs; (6) appellant changed his estimated predicted yield for plants; and (7) there was an identical watering system in appellant's neighbor's grow, and appellant did not mention nor was there documentation that he was working as part of a collective or cooperative.

Appellant testified in his own defense. He testified he received his medical marijuana recommendation on August 4, 2015. He discussed with his doctor how much processed marijuana he would require for the year, and they decided upon eight pounds. He had a previous recommendation for 99 plants and six pounds of processed marijuana. He believed his recommendation was for 99 plants, like his previous one, and he was in compliance with the law in growing 98 plants. He estimated each plant would yield an ounce or two of processed marijuana. He testified the plants were not in the vegetative state, had begun flowering, and had stopped growing in size. He did not expect all the plants to survive because some were already sick and dying. When he previously grew 99 plants, about a third of them died, and of those that survived, he weighed and kept six pounds and burned the rest.

The jury convicted appellant of cultivating marijuana and possession of marijuana for sale, rejecting the lesser included offense of simple possession of marijuana.

As to count 1, appellant was sentenced to 16 months in prison, plus a consecutive one-year enhancement pursuant to Penal Code section 667.5, subdivision (b).[2] As to count 2, the court ordered no additional time imposed pursuant to Penal Code section 654. His total sentence was two years four months.

---

[2] Appellant was on probation with a suspended sentence on another case at the time he committed the present offense. He was sentenced on his probation case as his base term (a three-year sentence with a three-year firearm enhancement). The 16-month sentence on count 1 was one-third the midterm pursuant to Penal Code section 1170.12, subdivision (c)(1).

DISCUSSION

I. Denial of Motion to Quash

Appellant argues the trial court erred by denying his motion to quash the search warrant and suppress evidence because the search warrant was not supported by probable cause. We disagree.[3]

A. Relevant Background

The probable cause statement submitted in support of the request for the search warrant stated the detectives conducted an overflight operation on July 29, 2015, at an elevation greater than 500 feet. During the operation, they observed numerous marijuana grow sites, one of which was located behind the residence. The affiant observed numerous emerald green plants in the back yard of the residence, which based on his training and experience he recognized as marijuana. In over 20 overflights and observations of 300 marijuana grow sights, he had never misidentified a marijuana plant. He did not observe any indication that the grow site was intended for medicinal purposes. The affiant utilized an internet-based search engine updated daily by the Tulare County Assessor's Office and identified the residence later determined to be appellant's residence. Later that day, another detective conducted ground observations at the residence at the identified address. The detective advised the affiant he stopped in front of appellant's residence in his vehicle and detected a strong odor of growing marijuana plants. The detective advised the affiant he did not observe any posted documents identifying the marijuana as medical in nature. The affiant noted there are other marijuana grows at adjacent properties near the residence.

---

[3] Appellant's motion was heard at his preliminary hearing. He argues that if we find this issue forfeited because he did not renew the motion at trial, the failure to renew the motion constituted ineffective assistance of counsel. We resolve the issue without considering whether the issue was forfeited or whether there was ineffective assistance of counsel because appellant's contention fails on the merits.

At appellant's preliminary hearing, he moved to quash the search warrant and suppress evidence arguing the affidavit lacked probable cause. The court denied the motion.

B. Discussion

When reviewing a trial court's ruling on a motion to suppress, "[w]e defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362.) In reviewing a search conducted pursuant to a warrant, an appellate court inquires "whether the magistrate had a substantial basis for concluding a fair probability existed that a search would uncover wrongdoing." (*People v. Kraft* (2000) 23 Cal.4th 978, 1040, citing *Illinois v. Gates* (1983) 462 U.S. 213, 238-239.)

Appellant accepts the affidavit contains facts that support marijuana was being cultivated at his residence. His position, rather, is that there were no facts to support marijuana was being grown *illegally*; that is, not in compliance with the CUA. Appellant's position is without merit. The law is clear that law enforcement has no affirmative duty to investigate a suspect's status as a qualified patient or primary caregiver prior to seeking a search warrant. (*People v. Clark* (2014) 230 Cal.App.4th 490 (*Clark*); see *People v. Kelly* (2010) 47 Cal.4th 1008 (*Kelly*).) Appellant acknowledges *Clark's* holding, but alleges his case is distinguishable from *Clark* because, in *Clark*, there were facts, according to appellant, that indicated marijuana was being grown illegally rather than lawfully pursuant to a physician's recommendation. Nonetheless, he argues the decision in *Clark* should be "reexamined."

In *Clark*, law enforcement received information from a confidential informant that an illegal indoor marijuana grow was established in the defendant's residence. Law enforcement conducted an investigation of the outside of the residence and smelled a strong odor of unburnt marijuana emitting from the garage as well as a "window mount"

air conditioner running continuously despite it being a cold winter night. Based on the affiant's training and experience of marijuana cultivation, specifically indoor marijuana grows, he knew an indoor marijuana grow needed a dedicated air conditioner because grow lights generate heat. Grow lights and air conditioners are commonly turned on at night and early mornings to avoid law enforcement detection. The affiant also conducted a criminal background check on the defendant and learned he had various criminal convictions. (*Clark, supra,* 230 Cal.App.4th at p. 494.)

The defendant in *Clark* appealed the trial court's denial of a motion to suppress evidence asserting, like appellant here, that there was no probable cause to support the search warrant affidavit because although it established he was cultivating marijuana, it did not show he was doing so illegally. The defendant asserted the affiant was required to show the defendant's cultivation was not in compliance with the CUA and the Medical Marijuana Program (MMP) Act (§ 11362.7 et seq.) pursuant to the Supreme Court's decision in *People v. Mower* (2002) 28 Cal.4th 457 (*Mower*).

The *Mower* court held that section 11362.5, subdivision (d), of the CUA does not confer "complete" immunity from prosecution. Rather, it confers limited immunity which (1) allows a defendant to raise his or her status as a qualified patient or primary caregiver as a defense at trial or (2) permits a defendant to raise such status by moving to set aside an indictment or information prior to trial on the ground of the absence of reasonable or probable cause to believe that he or she is guilty. (*Mower, supra*, 28 Cal.4th at p. 464.)

The court in *Clark* concluded:

> "The holding in *Mower, supra,* 28 Cal.4th 457 on the immunity from arrest issue does not state or imply that law enforcement officers seeking a search warrant have an affirmative duty to investigate a suspect's status as a qualified patient or primary caregiver under the [CUA] prior to requesting that a warrant issue. To the contrary, *Mower* makes clear that although the [CUA] provides a defense at trial or a basis to move to set aside the indictment or information prior to trial, it does not shield a person

> suspected of possessing or cultivating marijuana from an investigation or arrest. Therefore, given the holding in *Mower,* that act cannot be interpreted to impose an affirmative duty on law enforcement officers to investigate a suspect's status as a qualified patient or primary caregiver under the act prior to seeking a search warrant." (*Clark, supra,* 230 Cal.App.4th at pp. 499-500.)

Contrary to appellant's assertion, the *Clark* court's decision did not turn on whether the defendant was cultivating marijuana legally or illegally. *Clark's* holding is well-supported by the high court's decision in *Mower* and emphasizes the CUA is an affirmative defense, not immunity from investigation or arrest.[4] What appellant fails to recognize is that the cultivation of marijuana is *illegal*. At the time of his offense, cultivation of marijuana was criminalized by section 11358 as a "wobbler" offense: "Every person who plants, cultivates, harvests, dries, or processes any marijuana or any part thereof, except as otherwise provided by law, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code." Thus, the direct observation of plants growing at appellant's residence was a substantial basis for the issuing magistrate to have concluded a fair probability existed that a search of the residence would uncover wrongdoing. We find no reason not to apply the reasoning in *Clark* to appellant's case.

As respondent points out, our position is also supported by *People v. Fisher* (2002) 96 Cal.App.4th 1147 (*Fisher*). In *Fisher,* the police during a flyover saw three

---

[4] We recognize that subsequent to the decision in *Mower,* the MMP was enacted. The MMP delineates a voluntary "identification card" scheme where a person who suffers from a serious medical condition and the designated primary caregiver of that person may register and receive an annually renewable identification card that can be shown to a law enforcement officer who otherwise might arrest the program participant or his or her primary caregiver. (§ 11362.7.) Since the MMP has been enacted, the Supreme Court has reinforced, citing *Mower,* that, although participants of the MMP are protected from arrest, the CUA does not grant immunity from arrest for the crimes of possession and cultivation of marijuana; rather, it provides an affirmative defense to prosecution at trial. (*Kelly, supra,* 47 Cal.4th 1008.) Thus, we agree with the reasoning underlying the decision in *Clark.*

marijuana plants growing in the defendant's backyard, obtained a search warrant, and upon executing it, were presented by the defendant with a written note purporting to be a physician's permission to use marijuana in compliance with section 11362.5. The police kept searching and found an illegal weapon and ammunition. The appellate court found that suppression of the evidence was properly denied, ruling that section 11362.5 only provides the defendant with an affirmative defense regarding marijuana charges to be proved at trial, and holding that the officers had no duty to stop searching even upon being presented with the physician's note.

The law is clear: not only does law enforcement have no affirmative duty to determine whether marijuana observed is grown in compliance with the CUA, they may rely on the presence of marijuana as probable cause to search even when confronted with evidence that the marijuana is being possessed for medicinal purposes. The trial court did not err by denying appellant's motion to quash the search warrant and suppress evidence.

II. Instructional Error

Appellant argues the court erred by giving the following modified version of CALCRIM No. 3412 on the CUA defense:

> "Possession or cultivation of marijuana is lawful if authorized by the [CUA]. The [CUA] allows a person to possess or cultivate marijuana for personal medical purposes when a physician has recommended such use. The amount of marijuana possessed or cultivated must be reasonably related to the patient's current medical needs.
>
> "The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or cultivate marijuana for medical purposes, *or that the defendant, if authorized, possessed or cultivated an unauthorized amount or for an unauthorized purpose.* If the People have not met this burden, you must find the defendant not guilty of this crime."

CALCRIM No. 3412 was modified by adding the italicized portion to the instruction. Appellant argues the modification misstates the law. He argues the instruction

impermissibly led the jury to believe they could reject the CUA defense simply based on appellant growing more plants than his recommendation stated rather than analyzing whether the amount he was growing was reasonably related to his current medical needs. We agree and find, in the context of the present case, the modification is impermissibly vague in that it could have led the jury to believe the physician's recommendation places a cap on what is "authorized" by law.

"The CUA provides a defense for physician-approved possession and cultivation of marijuana: 'Section 11357, relating to the possession of marijuana, and section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.' " (*People v. Wright* (2006) 40 Cal.4th 81, 89–90; § 11362.5, subd. (d).) The MMP "expressly extends a CUA defense to the marijuana crimes of transportation, and possession for sale, *insofar as the marijuana was possessed and/or transported by an eligible patient for his or her personal medical purposes.* (§ 11362.765, subds. (a), (b)(1).)" (*People v. Wright*, *supra*, at p. 101, dis. opn. of Baxter, J.).)

The amount "authorized" by the CUA is that which is "reasonably related to the patient's current medical needs." (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1549; *Kelly*, *supra*, 47 Cal.4th 1008.) "What precisely are the 'patient's current medical needs' must [be] a factual question to be determined by the trier of fact. One (but not necessarily the only) type of evidence relevant to such a determination would be the recommending or approving physician's opinion regarding the frequency and amount of the dosage the patient needs." (*People v. Trippet*, *supra*, at p. 1549, cited with approval in *Kelly*, *supra*, at p. 1013.) We cannot find nor does respondent cite any legal authority to support the proposition that when a physician places an amount on a written recommendation, he or she sets a legal limit on what a defendant can possess under the

CUA. To the extent the instructions allowed the jury to believe so, the instruction was modified in error.

We note that generally, a trial court should avoid modifying model instructions, particularly CALCRIM instructions. CALCRIM instructions are approved by the Judicial Council and maintained by an advisory committee, which is made up of bench officers, attorneys, and law school professors and " '[r]egularly reviews case law and statutes affecting jury instructions and makes recommendation to the council for updating, amending, and adding topics to the council's criminal jury instructions.' " (Levenson & Ricciardulli, Cal. Criminal Jury Instr. Companion Handbook (2018-2019) § 1:1.) Updates are made in response to public comments and concerns and impact of appellate opinions on areas of law addressed by CALCRIM. (*Ibid.*) They are thoroughly vetted in order to ensure the instructions not only accurately state the law but make it easily understandable to jurors.

Nonetheless, we find the error harmless under any standard. The jury necessarily rejected the premise that appellant possessed for his personal medicinal use when, under other properly given instructions, it found he possessed with the specific intent to sell. The jury had the option of convicting appellant of simple possession of marijuana. Instead, it found beyond a reasonable doubt he possessed the drug with the specific intent to sell it, and its conclusion is supported by substantial evidence. Holguin was qualified without objection as an expert in the sales and cultivation of marijuana and the differentiation of medical and recreational marijuana. His opinion and the facts on which it was based that the marijuana was used for sales and not medicinal or recreational use is substantial evidence the jury could rely upon. (Contra, *People v. Hunt* (1971) 4 Cal.3d 231, 237-238.)

Appellant did not offer any evidence that the 98 plants were reasonably related to his current medical needs. To the contrary, he testified when he had previously grown 99 plants, a third of them died, and those that survived yielded more than six pounds.

Appellant testified his doctor recommended eight pounds of processed marijuana. Holguin testified all the plants were healthy and would likely yield at least half of a pound per plant. Holguin's conservative estimate was the plants would have yielded approximately 49 pounds of marijuana, more than six times the amount appellant testified he personally used in a year.

Though the modification of the instruction allowed an inference not supported by law, any error was harmless.

DISPOSITION

The judgment is affirmed.

_____
DE SANTOS, J.

WE CONCUR:

_____
SMITH, Acting P.J.

_____
SNAUFFER, J.